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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 829

ADLER CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A–1—A–8) is reported at 423 F. 2d 1362.

JURISDICTION

The judgment of the Court of Claims was entered on April 17, 1970, and a motion for rehearing was denied on July 15, 1970. The petition for a writ of certiorari was filed on October 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a release signed by a government contractor bars him from presenting certain claims against the United States.

STATEMENT

This is a suit based on certain claims arising out of a 1952 government contract for construction of a dam. The Court of Claims found that these claims were barred by a valid release petitioner had signed.

A. THE EVIDENCE

In August 1952 the Bureau of Reclamation issued an invitation for bids on the construction of the earth-filled Pactola Dam in South Dakota. Congress approved the project for immediate construction in order to make available a much needed water supply for an air base (Pet. App. A–20—A–21). Since the work was of "a highly urgent nature," it was important that construction begin before the onset of winter weather in 1952; otherwise a full season's delay would result. *Id.*

Prior to bidding, Adler thoroughly explored the entire project site (Pet. App. A–10). He then submitted a bid of $3,761,115, some 23 per cent under the second low bid of $4,878,476 (Pet. App. A–11). The invitation to bid specified that a bidder would not have any right to secure relief "on the plea of error in the bid" or of negligence in making the bid (Pet. App. A–10).

On September 30, 1952, the bids were opened. The Board considering the bids believed that "the low bidder could not complete the work at his bid prices without considerable strain on his financial resources" (Pet. App. A–11). However, it recommended acceptance because "he is known as a conscientious and skill-

ful contractor, and unquestionably would prosecute the work vigorously and in full compliance with the terms of the specifications" (Pet. App. A–11—A–12).

Later that day, when Adler learned of the disparity in his bid, he expressed shock, but because of his involvement in litigation, he did not confer with government representatives until October 7, 1952 (Pet. App. A–12). At that time, he told the government officials that "he may have made a mistake" and wrote to the Chief Engineer, requesting that the awarding of the contract be delayed (Pet. App. A–12—A–13). On October 11, the Chief Engineer informed him that the Government would "withhold making the award a reasonable length of time," but that it was necessary to start the project as soon as possible (Pet. App. A–13).

On October 14, the Bureau of Reclamation awarded the contract to Adler, at which time Bureau officials advised him to submit an affidavit explaining his errors, which would be transmitted to the Comptroller General for advice as to bid revision, award to the next low bidder, or contract readvertising (Pet. App. A–14). Adler was told that any correction would have to be effectuated by the Comptroller General because the Bureau's officials lacked such authority (Pet. App. A–14—A–15). The contracting officer forwarded the statement to the Commissioner of the Bureau of Reclamation along with the recommendation that the Comptroller General be asked to permit an appropriate reformation of the contract (Pet. App. A–16). The Bureau accepted the

recommendation, which was forwarded to the Comptroller General for a decision (Pet. App. A–16).[1]

On November 14 the Comptroller General determined that "[u]nder all the circumstances, this Office will not be required to object to the correction of the bid" (Pet. App. A–20—A–21) and three days later Adler met with Bureau of Reclamation representatives in Denver to reform the contract.[2]

The Bureau was apparently concerned that Adler's corrected prices for certain items were more than the government's prebid estimates or the bids of other contractors regarding the same items (Pet. App. A–17). Consequently, the Bureau's representatives informed Adler they would not allow corrections that exceeded these amounts. They also emphasized that no further delay would be permitted, that Adler would have to sign the contract documents immediately, and that a notice to proceed would be issued that day (Pet. App. A–17). Adler then signed an amendatory Agreement[3] which increased the contract price by $485,265, an amount $136,240 less than the increase of $621,505 Adler had sought (Pet. App. A–19).[4] In a letter to the Senate Judiciary Committee in 1960, when peti-

[1] Adler was not advised of these favorable recommendations by the contracting officer and the Bureau (Pet. App. A–16—A–17).

[2] A text of the Comptroller's decision was not yet available (Pet. App. A–17).

[3] At the same time he signed the basic contract (Pet. App. A–20).

[4] From the contract, as amended, Adler could have expected to earn a profit of $557,696 (according to the government's interpretation), or $271,083 (according to Adler's interpretation) (Pet. App. A–21).

tioner had a private bill for relief pending, the Undersecretary of the Interior stated that the proposal embodied in the amendatory agreement "in good conscience * * * should never have been made" because, even if the full increase had been allowed, the government would have "had the advantage of an exceedingly low bid" (Pet. App. A–23—A–24).

After the signing of the agreement, Adler commenced work, with an initial completion date of June 25, 1955 (Pet. App. A–24). However, as work progressed, he encountered subsurface or latent conditions at the site of the main dam foundation materially different from those shown in the drawings and specifications, which made excavation and refill work much more difficult and costly (Pet. App. A–25—A–34). At the urging of the Bureau of Reclamation (Pet. App. A–46), Adler continued working during the winter of 1955–1956 under severe weather conditions in order to minimize delays (Pet. App. A–49).

Early in July, 1956, the parties held a conference to determine how far the contract completion date should be extended [5] and to agree upon extra costs of performance. The Bureau of Reclamation, which had originally proposed an extension to April 27, 1956, agreed to extend the time to August 15, 1956. The Bureau also agreed with Adler to allow him $43,314 for 11 specified items of changed conditions. At the conclusion of the conference, Adler signed a letter confirming this agreement. The letter stated that "the

[5] Adler had requested such an extension in mid-1955 (Pet. App. A–44, A–45).

payment by the Bureau of Reclamation of the sum of $43,314.39 * * * for extras and changes * * * will be accepted as settlement in full of all claims for additional compensation under the contract arising out of work performed to date," and that "no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956" (Pet. App. A–51—A–52).

On August 15, 1956, the project was substantially completed (Pet. App. A–54). As contemplated by the basic contract,[6] Adler on November 20, 1956, executed a release which provided that in consideration of the payment by the United States to him of the amount then due under the contract, $213,562.60, he "releases and forever discharges the United States of and from all manner of debts, dues, sums or sums of money, accounts, claims and demands whatsoever, in law or in equity, under or by virtue of the said contract, except contract items and quantities as listed on the reverse side hereof" (Pet. App. A–54—A–55; Def. Exh. 30). On the reverse side of this release Adler listed 13 exceptions totalling $198,633.20 (Pet. App. A–55).

[6] The basic contract provided that upon completion of the project "the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefore, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein" (Def. Exh. 1, Art. 16; Pet. App. A–55).

Following his signing of this release and his receiving the $213,562, Adler administratively asserted claims for extra payment. On the basis of the claims that he had excepted from the November 20, 1957, release, Adler received $14,089 additional compensation (Pet. App. A–63); he was not, however, given anything on claims not excepted from that release (Pet. App. A–62—A–64).

B. THE COURT OF CLAIMS DECISION

This proceeding began in 1960 by a Congressional reference to the Court of Claims. In July 1964, the Court of Claims held that it could not accept jurisdiction as a Congressional reference case, but that it had jurisdiction under 28 U.S.C. 1491. Petitioner's principal claims related to the government's failure fully to correct the mistakes in Adler's bid, unanticipated subsurface conditions, excavation overruns, disputed excavation classification, work acceleration, and collateral matters (Pet. App. A–9). He sought recovery in excess of $800,000.

The Court of Claims, adopting the trial commissioner's decision, ruled that Adler was not entitled to recover (Pet. App. A–1—A–64). It held that "none of the claims constituting the present action were excepted from" the release Adler signed on November 20, 1956, in which he released the United States from all claims arising out of the contract, with 13 specified exceptions (Pet. App. A–3). The court concluded that the release was valid, notwithstanding Adler's claim that he had been economically coerced into signing

it. The court stated: "[N]o conceivable economic coercion could invalidate a release where, as here, there is no evidence that plaintiff was restricted in the scope of his exceptions to the release" (Pet. App. A–4).

ARGUMENT

1. The release of November 20, 1956, was in accordance with the contract of November 17, 1952, which stated that upon completion and acceptance of the work, the amount due the contractor will be paid upon presentation of a voucher "after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release" (Def. Exh. 1, Art. 16; Pet. App. A–55).

Adler challenges the contract on the ground that it was obtained through duress and the government's taking advantage of his mistaken bid. However, where a party desires to rescind a contract upon grounds such as duress or mistake, he must assert his right to rescind without delay, and he waives his right to rescission by electing to perform under the contract. See, *e.g.*, *Grymes* v. *Sanders*, 93 U.S. 55, 62; *Barnette* v. *Wells Fargo Nevada Nat. Bank*, 270 U.S. 438; *Lichter* v. *Goss*, 232 F. 2d 715 (C.A. 7); *Lewis* v. *Lowry*, 322 F. 2d 453 (C.A. 4), certiorari denied, 368 U.S. 977; *Gallen* v. *Lloyd-Thomas Co.*, 264 F. 2d 821 (C.A. 8); 5 Williston, *Contracts*, Rev. Ed., §§ 1580, 1594, 1626. Adler, having elected to perform under

the basic contract and receive payment under it, is bound by its terms—including the requirement that he execute a release upon completion of the work.

2. A release such as Adler signed in November 1956 bars the assertion of any claim not specifically excepted therefrom. *E.g., United States* v. *William Cramp & Sons, Inc.*, 206 U.S. 118; *H. L. C. & Associates Constr. Co.* v. *United States*, 176 Ct. Cl. 285, 367 F. 2d 586; *Watts Construction Co.* v. *United States*, 161 Ct. Cl. 801, 355 F. 2d 573. See also *Vann* v. *United States*, 420 F. 2d 968, 972 (Ct. Cl.). While the release itself may be avoided if it was obtained by duress, *e.g., Aircraft Associates & Mfg. Co.* v. *United States*, 174 Ct. Cl. 886, 357 F. 2d 373,[7] ample evidence supports the finding of the Court of Claims that the release was not so obtained. When Adler signed it, he was free to except any claims he wished, and he listed 13 exceptions totalling $198,633.20 (Pet. App. A–55).

Adler contends that he did not list his present claims among the exceptions because he thought he was barred from doing so by the earlier release, dated July 6, 1956 (Pet. 18).[8] But the difficulty with this contention is that the claims petitioner did except also related to work performed prior to July 6, 1956, the date of the first release (Pet. App. A–52). This is simply further support for the Court of Claims' find-

[7] See also *Robertson* v. *Frank Bros. Co.*, 132 U.S. 17, 23.

[8] This release was a letter providing that all pending claims arising up to July 6, 1956, were withdrawn and "no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956" (Pet. App. A–51—A–52).

ing that the government, by presenting the second release to petitioner with the opportunity for him to note exceptions, waived the first release (Pet. App. A–3).[9]

Thus, there is no justification for Adler's failure to list the claims involved here along with the 13 exceptions to the November release.[10] As the Court of Claims found, Adler was exercising "his own free choice" in listing 13—and only 13—exceptions to the release (Pet. App. A–4). Adler signed the November release free

[9] The government by its subsequent conduct can waive provisions of a release which are in its favor. See *Winn-Senter Construction Co.* v. *United States*, 110 Ct. Cl. 34, 65–66, 75 F. Supp. 255, 260.

[10] Adler contends that at the time of the signing of the November release he lacked certain relevant information which the government had, such as a revised drawing of the main dam foundation and knowledge that the Bureau had recommended to the Comptroller General full correction for Adler's mistaken bid (Pet. 13). The Court of Claims properly answered that his lack of this information does not excuse his failure to state his exceptions covering his present claims in general terms, which would have preserved his right to pursue them (Pet. App. A–4).

from duress, and there can be no question of its validity.[11]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1970.

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[11] Petitioner argues (Pet. 20–21) that recovery may be on a quantum meruit basis even if no recovery is permitted on the contract. However, the November 20, 1965, release releases the United States "from all manner of debts, dues, sums or sums of money, accounts claims, and demands whatsoever, in law or equity, under or by virtue of the said contract" except for the listed exceptions (Pet. App. A–55). Such language bars a quantum meruit claim, which arises by virtue of the contract. See *United States* v. *William Cramp & Sons, Inc.*, *supra*, at 206 U.S. 127–128.

Petitioner also contends (Pet 13–14) that the Bureau of Reclamation, in allowing only partial correction of the bid instead of full correction, acted contrary to a decision of the Comptroller General. The decision of the Comptroller General, however, was simply that "[u]nder all the circumstances, this Office will not be required to object" to full correction of the bid (Pet. App. A–20—A–21).

U.S. GOVERNMENT PRINTING OFFICE: 1970